U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 14 December 2006

CASE NO.: 2006-STA-48

IN THE MATTER OF

FERNANDO DEMECO WHITE,
Complainant

v.

GRESH TRANSPORT, INC., FEDERAL FREIGHT SYSTEMS, INC., UNITED FREIGHT, INC.,
Respondent

RECOMMENDED DECISION AND ORDER GRANTING SUMMARY DECISION

On November 14, 2006, Counsel for Respondents filed a motion for summary decision contending that pursuant to 29 C.F.R. § 18.40 the undersigned should dismiss the instant STA claim by application of judicial estoppel in that Complainant on February 17, 2005 filed a Chapter 13 bankruptcy petition followed by a Chapter 7 bankruptcy petition on February 22, 2005, which on July 21, 2006 was reopened. When the bankruptcy petition was reopened, Complainant never mentioned the present STA claim which he filed on May 19, 2006. By failing to mention the STA claim Respondents contend Claimant attempted to "double dip," i. e., obtain a discharge of his debts while concealing an asset of his estate from his creditors.

Respondents argue that Complainant was required in his Statement of Financial Affairs filed with the bankruptcy courts to list all suits and administrative proceedings to which he was a party within one year immediately proceeding, the filing of both the initial and reopened bankruptcy petition. Yet Claimant failed to mention the present STA claim which was pending when the bankruptcy petition was reopened in July, 2006. Complainant not only failed to mention this case upon reopening, he also failed initially when filing the initial bankruptcy petition to mention another active STA case, *White v. J.B. Hunt,* 2005 STA-65.

Respondents contend that three recent decisions of the U.S. Eleventh Circuit Court of Appeals are controlling and require dismissal of the instant claim by application of judicial estoppel. *Barger v. City of Cartersville,* 348 F.3d 1289, 1295 (11th Cir. 2003); *Burnes v. Pemco*

Aeroplex, Inc., 291 F. 3d 1282, 1286 (11th Cir. 2002) and *DeLeon v. Comcar Industries Inc.,* 321 F. 3d. 1289 (11th Cir. 2003). Respondents note that both *Burnes* and *Barger* are factual and legally identical to the present case with the plaintiff in *Burnes* filing for Chapter 13 bankruptcy and later converting the Chapter 13 bankruptcy into a Chapter 7 without reporting a discrimination suit plaintiff filed 6 months after the initial Chapter 13 filing. In *Barger* plaintiff filed a discrimination suit seeking injunctive relief to reinstate her to her former position after which she filed for Chapter 7 bankruptcy followed by an amendment of the discrimination suit seeking compensatory and punitive damages. In *Barger* plaintiff orally informed her attorney and the bankruptcy trustee about the employment discrimination suit but never amended her bankruptcy filings to reflect the employment discrimination claim.

In both *Burnes* and *Barger,* the Court affirmed the application of judicial estoppel and barred the plaintiffs from pursuing their discrimination noting in *Burnes* at 1286 two factors to be considered in invoking judicial estoppel: (1) the taking of inconsistent positions under oath and (2) that were calculated to make a mockery of the judicial system by intentional manipulation or concealment of claims. In both cases, the Eleventh Circuit found plaintiffs intentionally and under oath failing to amend their financial statements to the bankruptcy court to reflect their discrimination claims inferring intentional manipulation from plaintiffs' knowledge of the bankruptcy proceeding and motive to gain by concealment of these claims. Respondents argue that Complainant is playing "fast and loose with the courts" seeking a discharge from his creditors on the "cheap" while engaging in palpable fraud by concealing claim. *Payless Wholesale Distrib., Inc., v. Culver*, 989F.2d 570, 571 (1st Cir. 1993, *cert. denied,* 508 U.S.1078 (1993).

In response Complainant asserts he had no duty to disclose the instant claim to the bankruptcy court because the present claim was filed on May 19, 2006, which was more than 180 days after he filed his initial bankruptcy petition (February 17, 2005). According to Complainant he is required to report only those STA claims which arose either prior to his bankruptcy petition of February 17, 2005 or 180 days thereafter pursuant to 11 USC § 541 (a) (5) which provides that "Any interest in property that would have been property of the estate if such interest had been an interest of debtor on the date of the filing of the petition, and that the debtor acquires or becomes entitled to acquire within 180 days after such date."

In that same vein Complainant asserts no apparent responsibility to report additional law suits related to Respondent Gresh Transport which he filed in Georgia State Courts and was awarded $657.67 and $8,117.96 in back wages on March 15, 2006 and July 6, 2006, in *White v Gresham* Action No. 06M25185, Magistrate Court of Dekalb County, and *White v. Gresham,* Civil Action 06A47794-1, State Court of Dekalb County (Exh. H of Complainant's response).

Complainant denies any attempt to conceal assets from his creditors in the Chapter 7 bankruptcy proceeding and cites his action in reopening the bankruptcy proceeding and amending his list of assets to include another STA claim in *Naturally Fresh, Inc.,/White,* Case No. 4-5580-04-034, stating that shortly before filing his bankruptcy petition in February, 2005, he was informed by an OSHA investigator that this case was being dismissed for lack of merit d and that when he learned in fact that his case had merit he so informed the bankruptcy trustee , amended his financial statement to reflect said claim and had the Bankruptcy Court on July 21,

2006 reopen the instant bankruptcy proceeding to administer additional assets. Complainant never addressed his obligation to report his STA claim in *White v. J.B. Hunt,* 2005 STA 65, which was active or still pending when he filed the initial bankruptcy petition.

In applying the doctrine of judicial estoppel the Eleventh Circuit in *Burne,* at 1285-87 noted that: (1) judicial estoppel was an equitable doctrine invoked by courts to prevent the perversion of judicial process by prohibiting parties from deliberately changing positions according to the exigencies of the moment citing *New Hampshire* , 532 U.S. 742 at 749-50, 121 S. Ct. 1808 at 1814 (2001); (2) for judicial estoppel to apply two factors should be present i.e., inconsistent positions under oath in a prior proceeding which were calculated to make a mockery of the judicial system ; (3) a debtor seeking shelter under the bankruptcy laws must disclose all assets or potential assets to the bankruptcy court; (4) the duty to disclose is a continuing obligation which does not end with submission of forms but continues if circumstance change so that the creditors and court can make accurate decisions whether to contest or approve a no asset discharge; (5) judicial estoppel applies only to intentional contradiction which are not present when a debtor takes a inconsistent position either inadvertently or as a result of a good faith mistake. The obligation to disclose is present not only with the initial bankruptcy filing but continues throughout the pendency of the bankruptcy petition. *Jethroe v. Omnovva Solutions, Inc.,* 412 F. 3d 589 (5th Cir. 2005). Bankruptcy debtors have an express, affirmative obligation to disclose all assets including contingent and unliquidated claims. 11 U.S.C. § 521(1).

In *Barger,* the Eleventh Circuit at 1296 defined inadvertence as the lack of knowledge of the undisclosed debt or the absence of motive for concealment citing *In re Coastal Plains*, 179 F.3d 197, 210 (5th Cir 1999) and summarized the rule of judicial estoppel as barring as plaintiff from asserting a claim where the plaintiff knew about the undisclosed claim and had a motive to conceal it from the bankruptcy court following the ruling in both *Burnes* and *Coastal* as well as *DeLeon v. Comcar,* 321 F.3d 1289 (11th Cir. 2003).

In its motion for summary decision, Respondents claims there are no issues of material fact because it accepts Claimant's version of events. However, even if Claimant's version is accepted there is no liability because Complainant is judicially estopped from litigating this matter because of his failure to include the present claim in his list of bankruptcy assets. Complainant responds he had no obligation to report the instant claim and that according to his version of events Respondents fired him on January 29, 2006 because he refused to drive an unsafe truck which had a defective horn, leaky air brake system and worn tires under adverse weather conditions in violation of DOT safety regulations.

The standard for granting summary judgment or decision is set forth at 20 C .F .R § 18.40(d) (1994) which is derived from Federal Rules of Civil Procedure (FRCP) 56. Section 18.40(d) permits an Administrative Law Judge to enter summary judgment for either party "if the pleadings, affidavits, material obtained by discovery or otherwise, or matters officially noticed show there is no genuine issues as to any material fact and that a party is entitled to summary decision." If the moving party meets the initial burden of showing no genuine issue of material fact the burden shifts to the non-moving party to produce evidence or designate facts showing the existence of genuine issue(s) for trial with doubts and reasonable inferences resolved in favor of the non-moving party. *Reves v. Sanderson Plumbing Products, Inc.,* 120 S.

Ct. 2097, 2110 (2000); *Matsushita Elec. Indus. Co. Ltd., v. Zenieth Radio Corp.*, 475 U.S. 574 587 (1986). *Pegram v. Honeywell, Inc.,* 361 F.3d 272, 278 (5th Cir. 2004).

Section 18.40(c) provides that when a motion for summary judgment is made and supported by appropriate evidence, the non-movant or party opposing the motion may not rest upon mere allegations or denials of such pleading, but must set forth specific factors showing there are genuine issues of material facts. As the Supreme Court stated in *Anderson v. Liberty Lobby. Inc.,* 477 U.S. 242, *255* (1986) the non-movant must present affirmative evidence in order to defeat a properly supported motion for summary judgment, even where the evidence is within the possession of the moving party, as long as the non-movant had a full opportunity to conduct discovery.

The non-movant's evidence, if accepted as true, must support a rational inference that the substantive evidentiary burden of proof could be met. Where the non-movant presents admissible direct evidence such as affidavits, answers to interrogatories or depositions, the judge must accept the truth of the evidence set forth without making credibility or plausibility determinations. *T.W. Electric Service v. Pacific Electric Contractors* 809 F.2d 626, 631 (9th Cir. 1987). Conversely, if the non-movant fails to make a showing sufficient to establish the existence of an element essential to his case and on which they bear the burden of proof at trial, there is no genuine issue of material fact and the movant is entitled to summary judgment. Celotex Corp., v. Catrett, 477 U.S. 317, 322-323.

In the present case there is no question that Claimant was aware of the instant claim which he filed on May 19, 2006, and the reopening of his bankruptcy proceeding on July 21, 2006. As a matter of law, Claimant had the obligation to report the present STA claim when his bankruptcy proceeding reopened in July, 2006, but failed to do. The only remaining question is whether he had any motive to conceal them from the bankruptcy court. Although Complainant denied any improper motive to conceal this claim from the Bankruptcy Court, I find, like the situation in *Barger that* based upon the uncontested facts that Complainant was motivated to conceal the outstanding claim so as to keep the proceeds of this claim as well as proceeds of his state court action for him. Complainant's knowledge, plus motive, constitutes sufficient evidence from which to infer intentional manipulation requiring application of judicial estoppel.

Complainant's conduct was not inadvertent but clearly intentional done for no other apparent purpose than retention of assets which should have turned over to the trustee and bankruptcy courts for proper distribution. While Complainant asserts no intent to deceive the bankruptcy court by citing his action in amending his list of assets to include the claim in *White v. Naturally Fresh,* 2006-STA-6. Claimant had no explanation for his failure to include in his list of assets the claim in *White v. J.B. Hunt,* 2005-STA-65 which was a pending case when Complainant filed the initial bankruptcy petition. This lack of explanation plus his failure to explain the non-inclusion of the present claim upon re-opening convinces me there was no good faith mistake but rather an attempt as the First Circuit said in *Culver* to play "fast and loose with the courts" seeking a discharge on the "cheap" while concealing assets that should have been disclosed.

Accordingly, I find that judicial estoppel applies and recommend a grant of summary judgment and dismissal of the instant claim.

A

CLEMENT J. KENNINGTON
ADMINISTRATIVE LAW JUDGE

NOTICE OF REVIEW: The administrative law judge's Recommended Decision and Order, along with the Administrative File, will be automatically forwarded for review to the Administrative Review Board, U.S. Department of Labor, 200 Constitution Avenue, NW, Washington, DC 20210. *See* 29 C.F.R. § 1978.109(a); Secretary's Order 1-2002, ¶4.c.(35), 67 Fed. Reg. 64272 (2002).

Within thirty (30) days of the date of issuance of the administrative law judge's Recommended Decision and Order, the parties may file briefs with the Board in support of, or in opposition to, the administrative law judge's decision unless the Board, upon notice to the parties, establishes a different briefing schedule. See 29 C.F.R. § 1978.109(c)(2). All further inquiries and correspondence in this matter should be directed to the Board.